DIRECTOR OF PUBLIC PROSECUTIONS v McEACHRAN and Others

COURT OF APPEAL

NETTLE and ASHLEY JJA and SMITH AJA

23 October, 14 December 2006
[2006] VSCA 286

Criminal law — Confiscation of property — Provision of legal assistance — Victoria Legal Aid (VLA) — Order that VLA provide assistance — Validity — Conditions — Assistance secured by charge over land already subject to restraining order under confiscation legislation — Restraining order operating in rem — Prohibition on dealing with restrained land — Whether VLA able to take charge over real property while it remained subject to restraint — Whether charge can be given or taken over other property while same remains subject to restraint — Confiscation Act 1997 (No 108) ss 14, 143 — Legal Aid Act 1978 (No 9245) ss 27, 47A, 47B.

Section 143(1) of the Confiscation Act 1997 ("the Act") provided that where there was a subsisting restraining order made under the Act in respect of the property of a person and that person was in need of legal assistance in respect of any legal proceeding, and the person was unable to meet the full cost of obtaining such assistance from a private legal practitioner from unrestrained property or income, a court was authorised to order Victoria Legal Aid ("VLA") to provide legal assistance to the person on any conditions specified by the court.

Section 143(3) of the Act provided that if such an order was made and a condition of the provision of assistance by VLA was that the cost of such assistance or part of it be secured by a charge over any land or any other property in which the person had an interest, VLA could, in specified circumstances, secure the payment of any amount which had not been paid by taking out a charge over that land.

A County Court judge ordered VLA provide legal assistance to McE in respect of criminal charges brought against her conditional upon the cost thereof being secured by a charge over property in which McE then had an interest and which was already subject to a restraining order made under s 18 of the Act. The Director of Public Prosecutions appealed by leave against the order of a judge of the Trial Division dismissing an application for judicial review of the order.

Held, dismissing the appeal: (1) Section 143 permitted the County Court judge to make an order for assistance which imposed a condition of payment of costs, and which provided for the giving of security by way of a charge over land — the same consisting in whole or part of land which was subject to a restraining order — in that such an order did not conflict with the prohibition on disposing or dealing with restrained property in s 14(1) of the Act. [2], [40], [41].

(2) However, if an order for the giving of security by way of a charge over restrained real property was made, and if all the conditions of s 143(3) had been satisfied, VLA could not take and enforce a charge over land which was then subject to a restraining order. [2], [42], [65].

> *Bropho v Western Australia* (1990) 171 CLR 1; *Whyte v Victoria Legal Aid* [2002] VSC 130; *Sypott v R* [2003] VSC 41 referred to.

(3) A court was not empowered to order that security be provided by way of a charge over restrained property other than land in terms which would permit the giving and taking of a charge while the property remained subject to restraint. [2], [43], [65].

Appeal

This was an appeal against a decision of Bell J dismissing an application for judicial review of a condition of an order that Victoria Legal Aid provide legal assistance to an accused. The facts are stated in the judgment of Ashley JA.

S G O'Bryan SC and *L G De Ferrari* for the appellant.

K P Hanscombe SC and *C B Boyce* for the respondents.

Cur adv vult.

1 **Nettle JA.** I have had the advantage of reading in draft the reasons for judgment of Ashley JA.

2 I agree with his Honour, substantially for the reasons that he gives, that an order under s 143 of the Confiscation Act 1997 would not entitle Victoria Legal Aid to take a charge over restrained real property until and unless the property ceases to be restrained and I also agree with his Honour that Victoria Legal Aid would not be entitled to take a charge over restrained personal property until and unless it ceases to be restrained.

3 Accordingly, I too would dismiss the Director of Public Prosecution's appeal and refuse Victoria Legal Aid's application for leave to appeal.

4 **Ashley JA.** On 19 May 2005, a judge of the County Court ordered, in reliance on s 143(1) of the Confiscation Act 1997 ("the Act"), that Victoria Legal Aid ("VLA") provide legal assistance to Cheryl McEachran, the first respondent, in respect of charges brought against her. The order ("the impugned order") made it a condition of the provision of legal assistance that the cost thereof be secured by a charge over property in which Ms McEachran then had an interest. The property described in the order was property which was then subject to a restraining order made under s 18 of the Act.

5 On 1 March 2006 a judge of the Trial Division dismissed an application for judicial review of the impugned order. Now the Director of Public Prosecutions ("the director") appeals by leave against the order made by the judge in the Trial Division.

6 The substantial question below, and as argued in this court, was whether the County Court judge, when imposing a condition that all or part of the cost of provision of legal services by VLA to a person be paid by such person, had power to order that security be given by a charge over the real property of such person which was then the subject of a restraining order. That raises a question of statutory construction. As will be seen, the answer which in my opinion should be given to that question does not provide a complete answer to the substantial point at issue between the director and VLA.

7 In the Trial Division, there was also a question whether, assuming that the County Court judge had discretionary power, the exercise of the discretion miscarried. That involved consideration of the form of the restraining order in the particular case, and the view which was taken by the County Court judge concerning an apparent mistake in that order.

8 In this appeal, the director did not attack the exercise of the discretion — that is, in the event that the court decided, contrary to his submission, that the judge had been empowered to make the impugned order. Counsel for the director

explicitly stated that it was not his client's submission that the appeal should be allowed if the court should agree with his contention that, as a matter of construction of the impugned order, the supposed error did not exist; but that if it did, it had been an obvious slip which could even now be corrected. But he did press the court to decide whether the restraining order, properly construed, contained the asserted error; or else could be corrected under the slip rule. It remained relevant, he submitted, that these issues be resolved. Of this, more later.

A restraining order is made

9 Ms McEachran and her partner, Ron Smith, were charged with offences including child stealing, kidnapping, false imprisonment, conduct endangering life and intentionally causing serious injury. The charges arose out of a widely reported incident in which a young child went missingand was eventually found abandoned in a vacant premises in North Melbourne.

10 By application filed in the County Court on 9 September 2004 the director sought a restraining order in respect of property in which Ms McEachran and Mr Smith had an interest within the meaning of the Act. The jurisdiction to make an order was said to be engaged because the offences were forfeiture offences within the meaning of that Act.

11 Paragraph 6 of the application stated that the purpose of the order was that the property would be available:

> (a) to satisfy any forfeiture order that may be made under Division 1 of Part 3 of [the Confiscation Act];
> (b) to satisfy any compensation order that may be made by the Court under the Sentencing Act 1991.

12 On 10 September 2004 a judge of the County Court made a restraining order which was pertinently as follows:

> 1. THE COURT ORDERS pursuant to section 18 of the Confiscation Act 1997 that the Respondents be restrained whether by themselves or by their servants, agents or otherwise from disposing of or in any other way dealing with:
> (iv) Property situated at 56 Boromeo Road, Timor in the State of Victoria and more particularly described in certificate of title Volume 4650 Folio 888;
> 2. THE COURT DECLARES pursuant to s 15(3)(a) of the Confiscation Act 1997 that the aforementioned property be restrained for the following purposes: —
> (a) to satisfy any forfeiture order that may be made under Division 1 Part 3 of the Confiscation Act 1997;
> (b) to satisfy any compensation order that may be made under Part 8 of the Confiscation Act 1997.

The other property the subject of the order was land and two motor vehicles.

An asserted defect in the restraining order

13 Paragraph 2(b) referred not to a compensation order that might be made under the Sentencing Act 1991 — which had been one of the two purposes specified by the application — but to a compensation order that might be made under Pt 8 of the Act.

14 The purposes for which an order may be made are set out in s 15(1) of the Act. By s 15(3)(a), a court must state in its order the purpose for which the property is restrained. By s 15(1)(e), reference is made to the purpose of satisfaction of "any order for restitution or compensation that may be made under the

Sentencing Act 1991". Such an order is not to be confused with a pecuniary penalty order made under Pt 8 of the Confiscation Act. An order of the first kind runs in favour of the victims of an offence. An order of the second kind — which is discretely dealt with by s 15(1)(d) of the Confiscation Act — provides for payment of a pecuniary penalty to the State out of the assessed value of benefits derived by a defendant in relation to an offence. Paragraph 2(b) of the order, in terms, referred to neither kind of order. The judge pronounced an order which, no doubt accidentally, did not adhere to the language of the second purpose as it had been stated in the application. Then, the mistake having been made, it was reproduced in the authenticated order — which, ironically, was drawn up by the Office of Public Prosecutions.

The restraining order is varied

15 On 20 January 2005 another judge of the County Court made orders varying the restraining order. First, the restraint on dealing with a property at Victoria Street, Carisbrook,[1] was lifted so as to permit its sale — the proceeds to be disbursed in meeting the costs of sale, in discharging a mortgage, and in paying any balance to the Department of Justice "to be held on trust pending the final determination of this matter". Second, the restraints on dealings in respect of two motor vehicles were removed, so as to permit financiers to exercise their rights in respect of loan agreements relating to those vehicles. Again, any balance standing in favour of Mr Smith and/or Ms McEachran, after the financiers' entitlements had been satisfied, was to be paid to the Department of Justice and held on trust pending final determination of the proceedings against them.

An application is made and granted under s 143 of the Act

16 The application which gave rise to the impugned order was filed on 11 March 2005. It sought orders that VLA provide Ms McEachran with legal assistance in respect of the charges to which I have referred:

> … on the condition that the cost of VLA of providing the assistance be secured by —
> (a) a[n] equitable charge over the applicant's property located at 56 Boromeo Road, Timor in the State of Victoria, more particularly described in Certificate of Title Volume 4650 Folio 888; and
> (b) a lien over the applicants' (sic) interest in any funds held on trust by the Department of Justice pursuant to any previous orders of this Honourable Court.

The application further proposed that VLA, pursuant to s 143(3) of the Act, be permitted to take an equitable charge and a lien respectively over the property which I have just described.

17 Counsel for the director submitted, upon the hearing of the application, that it was proper for the judge to order that VLA provide legal assistance to Ms McEachran — this implying a concession that the requirements of s 143(1)(a) and (b) had been satisfied. Counsel argued, however, that the judge should not make an order for assistance subject to the conditions specified in the application.

18 The learned judge noted that the director's particular ground of objection was that:

> … the baby and the mother had suffered injury which may be subject to an application at the trial for compensation pursuant to s 86 of the Sentencing Act.

1. Of which, perhaps, Ms McEachran was the registered proprietor.

19 In connection with that objection, his Honour said this:

> Unfortunately, such funds are not being held for such purpose; hence, there is no jurisdiction for the DPP's objection.

20 The judge treated that circumstance as dictating the success of the application. By "jurisdiction" he meant, I think, that the director had not established, on the facts, that an order such as Ms McEachran sought would frustrate any declared purpose of the restraining order.

21 His Honour none the less dealt with the issue of construction — that is, whether to make the order sought by Ms McEachran would be inconsistent with pertinent provisions of the Act. That issue had been addressed by counsel for each of Ms McEachran, the director and VLA. Upon a consideration of the language of the Act, and principles of general importance in the administration of justice, his Honour concluded that particular provisions of the Act upon by the director relied[2] did not deny the court jurisdiction to make orders which imposed a condition concerning payment of costs, and for securing payment of the same by a charge over restrained property.

22 It may be that the judge was told that VLA would only provide aid in such circumstances. Any such intimation would have been misconceived. An order made under s 143 imposes an obligation upon VLA to provide assistance; and it is for the court to specify whether assistance is to be provided on any and what conditions.

23 In the event, the judge made an order as follows:

> THE COURT ORDERS THAT pursuant to section 143 of the Confiscation Act 1997:
>
> 1. Victoria Legal Aid (VLA) is to provide legal assistance to the Applicant, Cheryl Rosamond McEachran (known also as SHAY KARLI SMITH) in respect of the charges against her of false imprisonment and kidnapping on the condition that the cost to VLA of providing the assistance be secured by an equitable charge over the Applicant's property located at 56 Boromeo Road, Timor in the State of Victoria, more particularly described in Certificate of Title Volume 4650 Folio 888.
> 2. Pursuant to section 143(3) of the Act, VLA may secure the payment of the cost referred to in paragraph 1 of this order by taking an equitable charge over the Applicant's property located at 56 Boromeo Road, Timor in the State of Victoria, more particularly described in certificate of Title Volume 4650 Folio 888.

24 That order, it will be noted, provided for the giving of security only by reference to real property. It made no mention of the director taking a lien over any funds which the Department of Justice held in trust. Compare para (b) of the proposed conditions set out at [16] above.

Judicial review

25 The director, as I have said, brought a proceeding for judicial review by which, in respect of the impugned order, he sought an order in the nature of certiorari. The learned judge in the Trial Division described the director's principal argument this way:

> In both cases, counsel for the Director of Public Prosecutions contend that the judge had no power under the Confiscation Act to specify conditions of this kind when

2. Sections 14(5), 30, 143(6).

making orders for compulsory legal aid. Alternatively, if the judge had this power, it was discretionary, and the judge committed a legal error in exercising the discretion to specify the conditions. In any contest between the interests of victims and the interests of VLA, victims' interests should prevail, yet the judge afforded priority to the interests of VLA. On these grounds the DPP seeks judicial review of the judge's decision.[3]

26 His Honour decided, first, that the County Court judge had a discretionary power under s 143 of the Confiscation Act to specify conditions of the kind in dispute; second, that the County Court judge had not erred in the exercise of the discretion in the particular case.

This appeal

27 The grounds of appeal upon which the director relies in this appeal are as follows:

1. The learned Judge erred in law in the proper construction of section 143 of the Confiscation Act 1997 ("the Act") by deciding that a court, when ordering Victoria Legal Aid to provide legal assistance to a person seeking such assistance, has the power under section 143(1) of the Act to impose as a condition of that assistance and for the purpose of securing the payment of the cost of that assistance, that a charge be given in favour of Victoria Legal Aid in respect of property over which a restraining order is already in force.
2. Further, the learned Judge erred in law in the proper construction of section 143 of the Act by deciding that the reference in subsection 143(3)(b) of the Act to "*any land or any other property"* includes land or other property over which a restraining order is already in force.
3. The learned Judge erred in failing to hold that the County Court made an error of law:
   (a) in construing the original restraining order dated 10 September 2004 as not being made, inter alia, for the purpose of satisfying any compensation order within the meaning of subsection 15(1)(e) of the Act; alternatively
   (b) in its ruling that any error in the making of such order was, in the circumstances and despite its being due to an accidental slip, beyond remedy (insofar as the order referred to the Act instead of the Sentencing Act 1991 concerning compensation).

28 The third ground pertains to the suggested defect in the impugned order. It is convenient to explain why, as the director put it — correctly, in my opinion — that ground remains relevant.

29 We were informed from the Bar table that Ms McEachran was in fact convicted of one or more offences in December 2005. Each such offence, we were told, was what the Act describes as a "Schedule 1 offence".

30 In respect of such an offence, application may be made for the forfeiture of "tainted property".[4] By s 32(2) of the Act, any such application must be made "before the end of the relevant period (if any) in relation to the conviction". The "relevant period" is ordinarily the period of six months after conviction.[5] In Ms McEachran's case, no application for forfeiture was made within the

3. The reference to "both cases" is explained by there being two cases before his Honour, only one of which is before this court.
4. As to which see the definition in s 3(1) of the Act.
5. See the pertinent definition in s 3(1).

relevant period. Whether an application could have been successfully pursued in respect of the Boromeo Road property is not now relevant.

31 Next, had the impugned order unequivocally stated that the restraint was imposed so that property would be available to mean a pecuniary penalty order made under Pt 8 of the Act, it would have been inappropriate. That was common ground. The circumstances of the matter could not have called Pt 8 into play. Even if that was not so, the time for applying for such an order is now (in the ordinary course) long past; and no such application has been made.

32 But the circumstances which I have just mentioned do not mean, if the impugned order was made within power, that it could now have no impact upon the restraining order. By s 85C(1)(a) of the Sentencing Act, an application for a compensation order must be made within 12 months after an offender is found guilty, or convicted, of an offence — which period has not yet expired. In any event, by operation of s 85D, the time for making such an application may be extended.

33 In the event, if the second stated purpose in the restraining order should be understood to refer to an order for compensation under Pt 4 of the Sentencing Act, or if it was still open to a court to correct the order by application of the slip rule, then the question whether the County Court judge had power to make the impugned order would not necessarily be moot.

34 This also should be said: whether or not the impugned order were struck down, the putative victims might apply for compensation. It is conceivable that they might be met with the argument that the restrained property was not available for such a purpose. For that reason also, the third ground of appeal could be of importance.

The competing submissions on this appeal

35 At the heart of the submissions advanced for the director were these propositions:

- The Act sets up an elaborate regime for the making of restraining orders over property, which orders are to serve one or more particular identified purposes.
- Such orders operate in rem. Once made, they prohibit dealings in restrained property. Any dealing undertaken in breach of such an order constitutes an offence.
- There is a priority in the working out of the purposes specified by the Act. It lies in favour of meeting claims made by victims of offences for compensation or restitution in advance of any entitlement which the State might have by reason of forfeiture or the making of a pecuniary penalty order.
- It should not be supposed that in a part of the Act headed "Miscellaneous" there was to be found a power to make an order pertaining to dealing with restrained property; a fortiori, a power to make an order which would create a new priority of purposes in respect of restrained property, the primary purpose in some cases being to give recompense to VLA for services provided by it to the offender. So to read s 143(1) would create a clash with the restraint on dealings, to meet specified purposes, which is central to the Act.

- Further, to so construe s 143 would sit uncomfortably with the fact that the Act once specifically provided for the exclusion of property from a restraining order so that an offender could obtain legal assistance; but that the Act now provides, positively, that there shall be no such exclusion.
- Section 143(6) provides a series of priorities compatible with the construction of s 143(1) and (3) advanced by the director.

36 At the heart of the submissions advanced on behalf of VLA were these propositions:

- The language of s 143(1) and (3) is not confined, and should not be read down.
- Section 143 is a radical provision, in that it provides the only circumstances in which a court can require VLA to provide legal assistance to an offender. It is understandable that the provision would set up a quid pro quo, by which VLA was given primacy in any disposition of restrained property to meet costs the payment of which was a condition of the grant of assistance.
- The removal of the right to exclude property from a restraining order to meet an offender's legal costs was counter balanced by the introduction of s 143. What was done thereby was to prevent an offender's use of his or her property to pursue a "Rolls Royce defence", but to make provision for such legal assistance as a court considered necessary — with all the offender's property to be, in the discretion of the court, the source of payment for such assistance.
- If s 143 was to be read in the way contended for by the director, s 143(3)(b) would have no useful operation. In the vast majority of cases, all the known property of an offender is the subject of a restraining order.
- Section 143(6) would give VLA no comfort in a case where no forfeiture order or pecuniary penalty order was made — which was this case; and no substantial comfort in a case where a restitution or compensation order was made under Pt 4 of the Sentencing Act.
- The director's argument gained nothing from the circumstance s 143 appears in a part of the Act headed "Miscellaneous". A number of provisions which are unarguably important — concerning, for example, the nature of proceedings under the Act, the onus of proof, appeals, and the intended exclusion of the jurisdiction of the Supreme Court in the case of some provisions — are found within that Part.

Resolution of the appeal

37 In terms, what does s 143 provide?

- First, it empowers a court, in some circumstances, to oblige VLA to provide a person with legal assistance. When the impugned order was made, it had no statutory counterpart.[6] Under the Legal Aid Act 1978, the decision whether to grant or refuse aid is in the first instance a decision by VLA in the context established by, inter alia, ss 24, 25 of the

6. But see now the partial counterpart contained in s 37CA of the Evidence Act 1958, inserted by s 35 of the Crimes (Sexual Offences) Act 2006. In s 37CA, there is no equivalent of s 143(3) of the Act.

Act, and any written directions of the Attorney-General given under s 12M. Decisions to refuse aid, and certain other decisions, must be reconsidered on request, and there are elaborate provisions for independent review. See ss 19, 34, 35 and 36. But the regime, from beginning to end, is of administrative character.

- Second, the necessary starting point is that a restraining order has been made; and that such order remains in force.
- Third, the court must be satisfied that the applicant is in need of legal assistance and is unable to meet the full cost of obtaining such assistance from a private practitioner from unrestrained property or income.[7] The second of those matters recognises that in a particular case there may be unrestrained property — although in most instances it is probably the case that a restraining order addresses all the known property of the putative offender. None the less, in a particular instance property may be unrestrained because:
  - It was never the subject of the restraining order; or
  - It was subsequently excluded from the restraining order under any of ss 21, 22, or 24 of the Act; or
  - It was the subject of a further order made under s 26(1) of the Act.
- Fourth, it would be wrong to see s 143(3)(b) as the source of a court's power to specify a condition that assistance be granted subject to a condition that the applicant pay all or part of the costs of assistance, and that security for such payment be secured by a charge over property. Such a power, whatever be its ambit, is to be found in subs (1), by which a court may order VLA to provide assistance "*on any conditions* specified by the court" (emphasis added).
- Fifth, the power in a court to order VLA to provide legal assistance is thus expressed in broad language. It may be compared with the language of s 27(1) of the Legal Aid Act. The latter provides that the assistance may be granted:

  > Without charge or … subject to all or any of the following conditions.

  The conditions set out in s 27(1)(a)–(c) pertain respectively to payment of all or some part of pertinent costs, and/or disbursements, and interest thereon. I should notice para (c). It empowers VLA to impose a condition that all or part of the cost of providing assistance be secured:

  > (i) by a charge under section 47A(1) over any land or a charge over any other property which is recovered or preserved for that person in the proceedings; or
  > (ii) in any other manner VLA thinks fit over any property, whether land or any other property, in which the person has an interest or in which the person acquires an interest during the period of assistance.

- Sixth, it is implicit in s 143(1) that the assistance which VLA may be ordered to provide will be prospective from the date of the order. It will not be an order which addresses services already provided.

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7. The Act uses the term "unrestrained property" as a shorthand for property which is not subject to a restraining order. So will I. Further, I will use the term "restrained property" as shorthand for property which is subject to such an order.

- Seventh, in my opinion, subs (3) is to be understood as providing for the conjunction of four circumstances, each of which must have occurred, before VLA may secure the payment of an unpaid amount by taking out a charge over land. There must have been an order. The order must have imposed a pertinent condition. The person must have been required by VLA to pay, but must not have paid, an amount of costs. Finally, the person assisted must then be, colloquially, sole or part owner of land.
- Eighth, the reference to "that land" in the last part of subs (3) is, read naturally, the land referred to in para (d). It may be, at the same time, land which was the subject of specific reference in a condition earlier imposed by the court. But there need be no necessary coincidence. Indeed, it may be — the question need not be decided — that the earlier imposed condition need not have specified particular land.
- Ninth, the notion in subs (3) of VLA "taking out a charge" over land is, I think, assisted by consideration by subs (5), which takes one back to relevant provisions of the Legal Aid Act. Section 27(1)(c)(i) of that Act, as I have said, provides for the imposition of a condition that payment of costs and disbursements be secured by a charge over land or other property. Then one goes to s 47A. By subs (1), VLA is given power to effectuate such a condition "by taking out a charge" over land. Despite the reference to "any other property" in s 27(1)(c)(i), s 47A(1) only addresses the taking of a charge over land. The circumstances in which it may do are then set out by subs (2). Paragraphs (a) and (b) mirror s 143(3)(c) and (d) of the Act. Paragraph (c) in part restates the content of para (a), but adds the circumstance that the assisted person has not given a charge over the land. Given the circumstances in paras (a), (b) and (c), VLA may secure payment of the unpaid amount by "taking out a charge over the land".

  Then follow ss 47B, 47D and 47E, each of which is made applicable — by s 143(5) — to the taking of a charge by VLA where the circumstances described in s 143(3) are present.[8] Most important, for present purposes, is s 47B. It shows that the taking of a charge by VLA is a unilateral act, statutorily authorised, which does not require or depend upon any action on the part of the person assisted.
- Tenth, preliminary examination of s 143(6) — I will later refer to it in more detail — shows, in my opinion, a definite preference that the use of restrained property be prioritised by first meeting claims for compensation and/or restitution by a victim of an offence in those cases where the subsection can apply. The effective system of priorities, out of the value of property forfeited or penalty paid, is compensation/restitution first, VLA second, and the State third.

38 Next consider the import of a restraining order. By s 14(1) of the Act, no property or interest therein to which such an order applies:

> … is to be disposed of or otherwise dealt with by any person except in the manner and circumstances (if any) specified in the order.

8. Subsection (5), I should add, refers also to s 47C of the Legal Aid Act. I do not understand why. That section was repealed in 1998.

That directs attention to the phrase "dealing with property". By s 14 it is defined to include:

> (d) creating or assigning an interest in the property.

It could not be doubted that to charge land involves a dealing with property for the purposes of the Act. Because a restraining order attaches to property, and is not personal, it would be immaterial that VLA take a charge where s 143(3) applies, rather than that the person assisted take some action to create the charge.

39 It is the corollary of what I have thus far said that there will be no dealing with restrained land, assuming the making of an order for assistance which imposes a relevant condition, unless and until all the circumstances required by s 143(3) have occurred, and unless, when VLA takes a charge, the particular land is *then* restrained property. To emphasise the point, it would matter not that the land had been restrained property when the court imposed the condition.

40 The consequence, in my opinion, is that an order for assistance which imposes a condition of payment of costs, and which provides for the giving of security by way of a charge over land — the same consisting in whole or part of land which is subject to a restraining order — does not conflict with the prohibition on disposing or dealing with restrained property which is central to the concept of restraint set out in s 14(1) of the Act. That is so regardless whether, as the director asserts and VLA disputes, s 143(1) should not be read to derogate from that prohibition.

41 So, in my opinion, the County Court judge was empowered to make an order providing for the giving of security by way of a charge over restrained land. Section 143 should at least be read to permit such a thing. Not only is such a reading compatible with the scheme of the Act, it does not lack utility. One of the arguments advanced by counsel for VLA focused on the supposed risk of an acquitted person refusing to pay costs and disposing of property that had been freed from restraint before VLA could take out a charge. To read s 143 as permitting an order of the kind mentioned in s 143(3) to be made in respect of land which is then restrained, would certainly diminish that risk. At the least, in reliance upon a condition earlier imposed, VLA might take a charge over land which was no longer subject to a restraining order, provided that all the conditions of s 143(3) were satisfied. The same would be the case in respect of land which had been subject to a restraining order when the order for the giving of security was made, but which for some reason other than acquittal had ceased to be the subject of restraint on dealings.

42 The appeal could be disposed of at this point. The impugned order was relevantly within power. But substantial questions remain. First, if an order for the giving of security by way of a charge over restrained real property is made, and if all the conditions of s 143(3) have been satisfied, can VLA take and enforce a charge over land which is then still subject to a restraining order? That question was at the heart of the appeal. Second, is a court empowered to impose a condition that the payment of costs be secured by a charge over property — other than land — which is then subject to restraint? Third, if so, can VLA enforce such a charge while the property remains under restraint?

43 In my opinion, the answer to the first and third questions is no; while the answer to the second question is that a court is not empowered to order that security be provided by way of a charge over restrained property other than land

in terms which would permit the giving and taking of a charge while the property remained subject to restraint. In what follows, I explain those conclusions.

44 The modern approach to statutory interpretation involves two reconcilable elements: statutory dictate and common law principles. So, in *Bropho v Western Australia*[9] the court referred to:

> … the contemporary approach to statutory construction, with its added emphasis on legislative purpose … and permitted reference to a range of extrinsic materials for the ascertainment of that purpose …

In Victoria, the statutory dictate is particularly provided by s 35 of the Interpretation of Legislation Act 1984. Then, so far as the approach of the common law is concerned, the following statements are, I think, of particular importance:[10]

> … the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous … if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent … [Citations omitted.]

And:[11]

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme. [Citations omitted.]

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9. (1990) 171 CLR 1 at 20.
10. *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408.
11. *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381–2, [69]–[70] per McHugh, Gummow, Kirby and Hayne JJ.

45 Section 143(1) does not circumscribe the conditions which a court can impose on the grant of leave. Although that does not mean that any condition at all could be imposed, I have concluded that it permits the imposition of a condition which provides that VLA's costs be secured by a charge over restrained land.

46 Then, consider the scope of the charge contemplated by s 143(3). It may be over both restrained and unrestrained property, and over real and personal property. However, the *taking* of a charge by VLA is a different matter. The concluding words of s 143(3) show that it is limited to land of which the person assisted is either a sole or joint owner. Like the provisions as to charging property in the Legal Aid Act, no mechanism is provided for taking a charge over property other than land.

47 Next, on its face the reference to "that land" in the concluding words of s 143(3) is wide enough to embrace land which is restrained at the time when all the circumstances required by that subsection have occurred. To read it as referring only to land which is then unrestrained does involve reading a word or words into the subsection.

48 Read discretely, then, s 143(1) and (3) support VLA's case. But there are a large number of circumstances that favour a contrary conclusion.

49 First, it does not necessarily follow, because an order may be made which provides for a charge over restrained land, that a charge may be taken over land which remains restrained when all the circumstances required by s 143 have occurred. Such an order can still have useful effect in some circumstances.

50 Second, there is no doubt that the Act sets up an elaborate scheme with respect to restraint on dealings with property. That scheme, in my opinion, is incompatible with s 143(3) operating to give VLA the right to take a charge over land which is then restrained. Important aspects of the scheme are:

- The declared purposes of the Act: see s 1(a)–(d) and, particularly for present purposes, (h).
- The nature of a restraining order: see s 14(1).
- The inclusive definition of the phrase "dealing with property": see s 11.
- The express power of a court, when making a restraining order, to provide for meeting the reasonable living expenses and the reasonable business expenses of a person to whose property the order applies: see s 14(4).
- The express prohibition upon a court, in making a restraining order, providing for the payment of legal expenses in respect of any legal proceeding: see s 14(5). This is a very wide prohibition. It specifically extends to civil as well as criminal proceedings; and in the latter case to any criminal proceedings. With respect to criminal proceedings, it is the obverse of s 16(9) of the predecessor legislation, the Crimes (Confiscation of Profits) Act 1986 ("the 1986 Act"). Moreover, the change was intended, as the Attorney-General made clear in her second reading speech with respect to the Act.[12]
- The express specification of purposes to which property which is subject to a restraining order may be put: see s 15(1). Of the five purposes, three relate to forfeiture, one to pecuniary penalty orders, and one to orders

12. Hansard, Legislative Assembly, 13 November 1997, pp 1148–9.

for restitution or compensation under Pt 4 of the Sentencing Act. To emphasise the obvious, none relate to the payment of legal costs.

- The requirement, consequential upon there being stated purposes, that an application for a restraining order state the purpose(s) for which such order is sought, and that a restraining order state the purpose(s) of the restraint: see s 15(2) and (3)(a).
- The circumstances in which an application for a restraining order may be made, and the necessary content of such an application: see s 16, and particularly subs (4)(e).
- The obligation of a court to make a restraining order if satisfied of certain matters. Note particularly that where a stated purpose is the availability of restrained property to meet claims for restitution or compensation (for convenience, "compensation claims", and, by analogy, "compensation orders"), the court must be satisfied that application for the same have been or are likely to be made, and that the order of the court under Pt 4 of the Sentencing Act would be likely to exceed $10,000: see s 18(1)(d).
- Detailed procedures for seeking exclusion of property from a restraining order; and as to the circumstances in which an order for exclusion may be made: see ss 20–22 and 24. Note that in several circumstances the court is required to be satisfied that property will not be required to satisfy any purpose for which the order was made: see ss 21(a)(ii) and 22(a)(iii) — the latter of which refers specifically to prospective compensation orders under the Sentencing Act. Note also that in one particular factual situation — where the applicant for exclusion is not the defendant — a court is empowered to make an exclusion order notwithstanding that it is not satisfied that restrained property will not be required to satisfy a purpose for which the restraining order was made: see s 21(b)(ii). In that situation, it may be said, the legislation has disclosed a conscious choice in favour of a blameless non-defendant applicant as against potential disadvantage to a victim.
- Provision for making further orders in relation to restrained property — that is, orders other than exclusion orders: see s 26. That section sets out examples of orders which might be made: see s 26(5). While the list is not intended to be exhaustive, it certainly does not suggest that the section could be used to make an order that legal costs be met out of restrained property, or that property could be rendered unrestrained in order that a defendant's legal costs be met.
- The varying circumstances in which a restraining order may come to an end. Note particularly s 27(4), which provides for circumstances in which the discharge of a restraining order is linked with, inter alia, the making of a compensation order. Note also the powers of a court which refuses to make an order for a purpose specified in a restraining order: see s 27(5).
- Provision for registering the particulars of a restraining order. In the case of land under the Transfer of Land Act 1958, a caveat may be lodged: see s 28(2). That is some indication of the importance which the Act

attaches to a restraining order — which, as the Act makes very clear, is an order made for specified purposes.[13]

- The circumstance that knowing contravention of a restraining order by a disposition or other dealing in restrained property is made a criminal offence, and that knowledge of a restraining order is deemed where particulars of the order have been registered: see s 29.
- Specific priority being given to satisfaction of compensation orders. By s 30, if one of the stated purposes of a restraining order is satisfaction of compensation orders, and an order of the latter kind is made, then the State must ensure that the same is satisfied out of the restrained property, so far as that is possible, before satisfaction of any other purpose. Then, by s 31(1), if property is forfeit, or a pecuniary penalty order is made, and if a compensation order is also made — or, indeed, damages are awarded — the State must satisfy the order of the latter kind, broadly to the amount of the value of the property forfeited or penalty paid.
- Extensive provisions relating to forfeiture and pecuniary penalty orders. Note, when a forfeiture order is made, or automatic forfeiture occurs, that property vests in the relevant minister subject to then existing mortgages, charges or encumbrances, special reference being made to land under the Transfer of Land Act; but that power is given to a court to discharge mortgages or charges in some circumstance: see ss 41(2) and 42(1). The purposes, then, for which a restraining order is made may lead to the removal of an encumbrance designed to inhibit achievement of those purposes. Note also the preference given to restitution and compensation orders over pecuniary penalty orders by ss 59(5) and 64(4).

51 Third, it is convenient to make discrete reference to s 143(6). In cases in which it has application, it builds upon the priority in favour of the compensation entitlement of victims over the entitlement of the State — which is particularly found in ss 30 and 31, but also in ss 59(5) and 64(4). The substantive effect of s 143(6) is that VLA's slice of the cake comes after the victims' compensation slice. And yet, as VLA would have it, the effect of s 143(3) is that, where it applies, VLA has a still earlier slice of the cake. Indeed, if VLA's argument was correct, all the cake might be gone before s 143(6) could come into play.

52 Fourth, and further developing what I have just said, if the proper reading of s 143(3) is that VLA should be permitted to take a charge over land which is restrained at the time when the conditions of the subsection are satisfied, the seeming consequence would be, in a case where the only restrained property was land, that the operation of s 143(6) would depend upon the sequence of events. If, in a particular case, there was automatic forfeiture or an order was made for forfeiture or a pecuniary penalty before VLA sought to take its charge, there might be no land upon which such a charge could be taken; or, if there was remaining land, it might be insufficient to meet VLA's costs. Then s 143(6) could operate, and the amount of VLA's recovery would be affected, in substance, by the amount of any compensation paid. But if VLA, colloquially, got in first, any

13. If in a particular case land was restrained property, a caveat was lodged, and then VLA sought to take a charge over that land, a question could arise whether or not the caveat was maintainable. This shows, if it could otherwise be doubted, that the issue now under consideration is of likely practical importance.

claim for compensation might well go unsatisfied — that is, because there was nothing to forfeit, or because the value of what was left was inadequate to meet any compensation order.

53 Fifth, s 143(3) has nothing to say, as I have already remarked, about the taking of a charge over property other than land. None the less, the subsection implies that a condition might be imposed for the giving of security for costs by a charge over other kinds of property; and the words "or otherwise" in s 146(6) could embrace recovery by enforcement of such a charge. Do those circumstances lead to the conclusion that the Act implicitly contemplates a charge being taken and enforced over property other than land which is then restrained? If so, it would tend against a conclusion that s 143 should be read to preclude the taking and enforcement of a charge over then-restrained land; for it would be very strange if the Act set up a regime which could produce different consequences for victims of offences depending upon whether the restrained property was land or property of some other kind.

54 In my opinion, s 143 could not sensibly be read to create such a distinction. The many provisions of the Act — and of the Sentencing Act, and of the Victims of Crime Assistance Act 1996 — which tell against a conclusion that a charge may be taken and enforced over land which is then subject to restraint, tell no less strongly against a conclusion that a charge may be given or taken and enforced over restrained property of another kind.

55 This should be added: I have already pointed out that a restraining order prohibits dealings with restrained property; and that contravention of an order is a criminal offence. At the very least, in the case of land, any breach constituted by the taking of a charge would be postponed until all the conditions of s 143(3) have been satisfied. But if the section permitted the giving and taking of a charge over other restrained property so soon as a conditional order was made for the giving of security by a charge over such property, there would immediately be an inexplicable disconformity between orders so far as they related to land and to other property; and the prospect of the commission of criminal offences at different points of time, and by differing parties, depending upon the type of property restrained.

56 This also should be added: if there was disconformity as to the time at which a charge could be taken and enforced over restrained property of different kinds, then the working out of s 143(6) — assuming VLA's general position was correct — would become even more of a lottery. It is possible to envisage VLA "getting in first" in respect of a charge over restrained property other than land, but not in respect of a charge over land.

57 Sixth, quite apart from what is revealed by the scheme of the Act in that connection, it was evidently the intent of the legislature that a primary purpose to which restrained property should be put was satisfaction of compensation claims made under the Sentencing Act. That can be seen from three matters:

- The second reading speech asserted that the reforms being effected to the 1986 Act were directed to achieve four key objectives. The fourth was:

> to enhance the range of effective restitution mechanisms for victims of crime by enabling criminally acquired assets to be restrained and preserved for ultimate restitution to victims of crime.

In fact, restraining orders can extend beyond criminally acquired assets. But that does not detract from the force of the asserted purpose.

- It is a feature of the Sentencing Act provisions which relate to restitution and compensation, as the government should be taken to have known, that they provide for awards against offenders which, if they are to be met, must be met by the offenders. There is no public money at stake. The Act, by giving priority to satisfaction of such claims, gave some assurance, where a restraining order had been made, that such an order would translate into a compensation order which was worth powder and shot. The perceived significance of s 30 of the Act can be seen in ss 85, 87 and 85M of the Sentencing Act.[14]
- Third, in the circumstances in which it has application, the Victims of Crime Assistance Act does involve the outlay of public moneys. There is provision in the Sentencing Act for recovery of such moneys from offenders: see Div 2A of Pt 4, which was introduced in 1996. There are also provisions in the Victims of Crime Assistance Act directed to that end, and provisions designed to ensure that a victim does not recover and hold both assistance and compensation or damages. But throughout, the concept that a victim shall have first call on restrained property for satisfaction of a compensation order under the Sentencing Act remains undisturbed.

58 Seventh, I consider that the ruling of Redlich J, as his Honour then was, in *Sypott v R*,[15] does not assist VLA.[16] In that case, restraining orders having been made the declared purpose of which was that the restrained property should be available to satisfy any compensation order that might be made, the defendant applied for an exclusion order in order to free property so that it could be used by him to retain the solicitors and counsel of his choice. Redlich J held, in effect, that an exclusion order could be sought for such a purpose. There was a fundamental principle that a man accused of a crime is entitled to employ out of his own resources the legal representative of his choice. The exclusion provisions should not be narrowly construed. The prohibition in s 14(5) was not in point. Section 143 provided no assistance in determining the scope of that prohibition. None the less, an exclusion order could not be made unless and until it was demonstrated to the court that sufficient property would remain restrained to satisfy any compensation order.

59 A number of points may be made. First, the case was not one in which VLA had been ordered to provide legal assistance to the defendant. Second, in such a case the scheme of the Act seems to be that a defendant is not entitled to the legal representative of his choice.[17] Rather, if his unrestrained assets are not sufficient to enable him to engage a private practitioner, VLA may be ordered to provide assistance. Third, it is in the discretion of the court which makes the order for assistance whether any condition for payment of assistance will be imposed. Fourth, where a question arises whether VLA is able to take a charge over

14. The last-mentioned provision was inserted by amendment in 2000. But nothing turns on it. The first and second of them were inserted by the Confiscation Act itself.
15. [2003] VSC 41.
16. Ibid at [16]–[23], particularly at [20].
17. Compare Charter of Human Rights and Responsibilities Act 2006, s 25(2)(d), commencing on 1 January 2007.

restrained property, the fundamental principle to which his Honour referred is not in issue. Fifth, his Honour's ruling implicitly recognised that even where the fundamental principle could nominally apply, it might collide with a statutory dictate to the contrary. So, the pertinent provision considered by his Honour contained a preclusion against freeing property from restraint where to do so would place in doubt the adequacy of restrained property to meet a compensation order.

60 It is, of course, true, as his Honour said, that s 14(5) addresses specifically the time when a restraining order is made. For that reason, it has nothing itself to say whether the exclusion provisions could be used, in substance, to free assets from restraint so as to permit payment of legal costs. But the exclusion provisions are not in any event concerned with the motive for a person — defendant or otherwise — seeking exclusion of property from the effect of a restraining order. Rather, the power of a court to exclude property depends on the court being satisfied of matters specified by the provision which is pertinent to the applicant's case. I have already pointed out that the retention of property under restraint so that compensation claims may be satisfied is made a relevant consideration by a number of the exclusion provisions.

61 Eighth, I consider that the decision of Gillard J in *Whyte v Victoria Legal Aid*[18] does not assist VLA's argument. In that case, counsel for an accused person applied, at trial, for variation of a restraining order as would permit VLA to take a charge over property which was then restrained. The stated purpose of the restraining order had been to satisfy any compensation order that might be made. The learned judge concluded that no application to vary a restraining order should be made in such circumstances without the victims being put on notice. That had not occurred. In any event, by the time that the application was ventilated, the trial was at an end. The applicant, who had been represented throughout by Victoria Legal Aid, had now been convicted, and Legal Aid was preparing for a plea. The rights of victims should now take precedence.

62 That was not a case in which an order had been made under s 143(1). Well before trial, the defendant had agreed, "once an order was made enabling her to follow that course", to give an equitable charge in favour of VLA over restrained property as security for the costs of her representation. No such order had been sought before trial. His Honour's reasons imply that, when an order was sought at trial, counsel did not analyse the possible legal foundation for making the same. Neither did his Honour — understandably having regard to the other problems which the application faced — undertake any such analysis. What can be said is that on no view was s 143(3) in point.

63 Ninth, I am not persuaded that the carefully expressed reasons of the learned judge below should lead me to accept the substance of VLA's case. His Honour observed that the language of s 143(1) was very wide. The reference in subs (3)(b) to "any land or other property", read naturally, would extend to restrained property. Further, subs (6) neither stated nor, his Honour opined, implied that legal aid could not be granted pursuant to a condition which provided for charging restrained property. Then, having noted that restraining orders may be made so that property can be available for particular purposes, his Honour expressed the opinion that neither by "express language nor by necessary

18. [2002] VSC 130.

implication" did the general provisions of the Act "require s 143(1) to be read to exclude a discretion to specify a condition for a charge over restrained property". That was so, importantly, in the case of s 14(5), which could sit comfortably with s 143(1). Again, said his Honour, while the Act treated the protection of property potentially needed to meet victims' claims as important, that matter could be dealt with as a discretionary consideration. Still further, his Honour held that consideration of s 26 did not suggest that a court was disentitled under s 143(1) to impose the impugned charging condition; and the same should be said of ss 30 and 31. In the case of the latter sections, victims' compensation could have been, but was not, afforded absolute priority over a charge in favour of VLA.

64 A number of the conclusions which his Honour expressed are beyond argument. So much is evident from my reasons. But, not being exhaustive, I do think that there was a good deal to be got from a close analysis of the working out of s 143(3), consideration of the unpredictable application of s 143(6) if an order could be made which charged restrained property, and analysis of the interrelationship between provisions of the Act pertaining to victims' compensation and the regime established by the Sentencing Act and the Victims of Crime Assistance Act.

65 In all, I consider that close analysis of s 143, and consideration of the overall structure of the Act as I have described it — including its interrelationship with the restitution and compensation provisions of the Sentencing Act, and at greater remove its interrelationship with provisions of the Victims of Crime Assistance Act — stands opposed to a reading of s 143 which would give VLA the right to take a charge over then-restrained land or other property. Such a reading would create a situation in which restrained property could in substance be freed from restraint in order to meet an accused's legal costs — a situation not hinted at elsewhere in the Act, and one at odds in sentiment with the express prohibition, broadly expressed, upon a court making provision for legal costs when making a restraining order. I do not accept that it could be a sufficient answer to the reading of the relevant provisions which in my opinion is compelled to say that the same result might be achieved, de facto, by an exercise of discretion not to make an order which permitted the charging of restrained property.

The meaning of the restraining order. A slip capable of remedy?

66 I turn to ground 3 of the appeal, its relevance now being confined to the matter to which I adverted at [34].

67 I reject the director's submission that the relevant stated purpose stated by the restraining order — "to satisfy any compensation order that may be made under Pt 8 of the Confiscation Act 1997" — was an unambiguous reference to a compensation order under Pt 4 of the Sentencing Act 1991. Simply put, it is not what the order said.

68 I reject also the director's submission that, if the pertinent part of the order was not plainly as he contended for, then it was ambiguous — this being the precursor to his submission that the supposed ambiguity could be resolved by reference to extraneous material. The meaning of the order made did not lack clarity. It was just an impossibility. It was not ambiguous on that account.

69 There was, in truth, an accidental slip. It is not too late for remedy. It is not decisive that the order has already been authenticated. Such an application might be made if the putative victims were to pursue a claim for compensation. In that

event, the discretionary considerations which led the judge who made the impugned order to refuse to correct the slip would not be relevant.

The appeal. A summary

70 The County Court judge had power to make the impugned order, even though it was founded on a wrong construction of the Act. Because the only property to which it applied was land, s 143(3) precluded VLA taking a charge then and there. Further, because it was conceptually possible that the property might no longer be restrained when VLA sought to take a charge, the order had utility. On the other hand, and importantly, the order did not mean, and could not be understood to mean, that VLA could take a charge over the land while the same continued to be restrained property.

71 Next, if in the future a judge proposed to make an order for grant of legal aid on condition that the person assisted pay costs, and that such condition be secured by a charge on restrained property, the order would need to make it crystal clear, in the case of property of every kind, that no step could be taken to effectuate or enforce the charge so long as the property remained subject to restraint.

72 Finally, if the putative victims hereafter made a claim for compensation, it would be within the power of the judge hearing the application to correct, by application of the slip rule, the second purpose stated in the restraining order.

A cross-appeal

73 The learned judge below ordered that there be no order as to the costs of the proceeding. By summons dated 18 May 2006, VLA sought leave to appeal against that order. Application for leave to appeal against the particular costs order was necessary.[19]

74 VLA seeks to contend that, his Honour having dismissed the director's application for judicial review, he erred by not granting VLA its costs. But not only does the draft notice of appeal not identify the nature of any alleged error in the learned judge's exercise of the costs direction, VLA placed no material before the court as would disclose the submissions advanced below or, critically, such reasons as the learned judge gave for making the order which he did.

75 Confronted by these difficulties, counsel for VLA did not seek to remedy them. Neither did she advance any substantial argument in support of the application for leave to appeal.

76 It is true that a (substantially) successful defendant will rarely be deprived of its costs. But that does not mean that an exercise of discretion to such effect necessarily reveals error. Counsel for the director advanced some explanation why the order was explicable. But whether or not that explanation represented the judge's reasoning, and, if so, whether it would constitute an exercise of discretion free of relevant error, need not be decided. Simply, VLA has not shown by proper material that the judge's exercise of the costs discretion is attended by sufficient doubt to warrant grant of leave to appeal.

Orders

77 Although the director's appeal has succeeded in substance, in form it should be dismissed. VLA's application for leave to appeal should be refused.

19. *Etna v Arif* [1999] 2 VR 353 at 377–9, [61]–[66].

78 **Smith AJA.** I have read in draft the reasons for judgment of Ashley JA.

79 I agree with the conclusions to which his Honour has come and the orders he proposes, substantially for the reasons he has given.

Appeal dismissed.

Solicitor for the appellant: *A Cannon*, Solicitor for Public Prosecutions.

Solicitors for the respondents: Victoria Legal Aid.

C R WILLIAMS
BARRISTER-AT-LAW